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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 459

MARGARET I. RILEY,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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MAY IT PLEASE THE COURT:

The petition of Margaret I. Riley respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

A. Statement of Facts.

This is an action brought by the plaintiff for injuries received while a passenger on defendant's train at Green River, Wyoming (R. 3).

Plaintiff, who was twenty-eight years of age, and her mother, Mrs. G. W. McDermott, resided and still reside in New Richmond, in the State of Wisconsin (R. 25). On July 2, 1944, plaintiff and her mother were passengers on one of defendant's eastbound passenger trains which originated in Los Angeles, California, and were enroute to their final destination that would take them, after transferring and riding over the lines of other railroad companies, to New Richmond, Wisconsin (R. 25).

During the course of the journey, plaintiff was injured on defendant's premises at Green River, Wyoming (R. 3). The circumstances of the accident are not here relevant, except it might be noted that while walking from the station to the train with Coca-Cola for herself and her mother, a hose was negligently moved by one or some of the defendant's servants in such a way that plaintiff was thrown to the ground, injuring her back (R. 3, 4). The record discloses that the defendant supplied a doctor who treated plaintiff on the train at Rawlins, Wyoming, and she required sedatives and hot packs that night (R. 22).

The morning following the accident one of the defendant's claim agents boarded the train for the purpose of attempting to settle plaintiff's case with her. He offered the sum of $40.00 if she would execute a complete release. A Chicago business man who was also riding as a passenger, advised plaintiff not to accept defendant's offer and the case was not settled (R. 25, 26).

Upon her return home, the plaintiff immediately placed herself in the hands of her family doctor at New Richmond (R. 26). After treating plaintiff a long period of time, her family doctor referred her to an orthopedic surgeon in St. Paul, Minnesota where, after a long period of treatment, it was found necessary to perform a spinal fusion and bone transplant operation upon her lower back (R. 26).

Plaintiff's claim came to the attention of the Assistant General Claim Agent of the defendant, John R. Mulich, who is located at Omaha, Nebraska (R. 29). He made several trips to New Richmond, Wisconsin in an effort to settle plaintiff's case (R. 26, 27, 29, 30). She was advised by Mulich that the railroad would make a fair settlement, and that she should not retain counsel (R. 26). When plaintiff discovered it was impossible to settle her case she employed William H. DeParcq and Robert J. Martineau of Chicago, Illinois, on June 17, 1948, to institute suit in her behalf against the defendant (R. 26, 27). This action was then commenced on June 22, 1948 in the Superior Court of Cook County, Illinois.

It is important to note at this point that the defendant was not amenable to process in either the state of plaintiff's residence nor in Minnesota where most of her medical attention had been furnished. Plaintiff therefore commenced the prosecution of her action in Chicago, which was the nearest place where the defendant could be sued.

B. Procedural History.

This action was brought originally in the Superior Court of Cook County on June 22, 1948, summons issued and service was had upon the defendant on June 23, 1948. It should be noted here that if the Wyoming statute was applicable, that is, if the four year period of limitations, rather than the two years period applied, plaintiff was within the period allowed by law in filing her suit.

On July 14, 1948 the defendant served notice, petition and bond to remove the cause to Federal Court on the ground of diversity of citizenship. On July 15, 1948 an order was entered in the Superior Court of Cook County, Illinois, in accordance with the prayer of the petition (R. 6, 13). It is interesting to note at this point that the de-

fendant had due notice of this action on June 23, 1948, ten days before the four year period would expire.

This was not a stale claim belatedly asserted against a defendant unable to protect itself, but contrariwise defendant had full knowledge of this claim from its inception. Defendant knew when the four year period specified in the Wyoming statute would run, but instead of filing its notice, petition and bond removing the cause to the Federal Court and filing its motion setting forth its reliance upon the Illinois statute of limitations, the defendant did nothing for a period of one month after suit had been commenced, in notifying the plaintiff or her attorneys that it intended to rely upon this special defense.

Even though the defendant knew plaintiff had a justifiable claim that might expire under the Wyoming statute on July 2, 1948, no pleading was interposed setting up the statute as a defense until the defendant felt sure that not only the Illinois statute but the Wyoming statute had run.

It was not until August 12, 1948 that the defendant filed the transcript of the Superior Court proceedings in the Federal Court for the Eastern Division of the Northern District of Illinois.

On August 17, 1948, defendant filed its motion to dismiss the complaint on the ground that the action was not commenced within two years from the accrual of the cause of action and was, therefore, barred by the Illinois statute of limitations (R. 14-17).

On September 18, 1948 after the plaintiff had been apprised of the fact the defendant intended to rely upon a special defense, and not a defense on the merits, plaintiff filed her motion to transfer the entire cause to the United States District Court for the District of Wyoming (R. 20-24). The motion to transfer was addressed to the trial court under the authority of Section 1406 of the New Fed-

eral Judicial Code. Also filed were the affidavits of plaintiff, her mother and counsel (R. 20, 24, 25, 28).

The matter was taken on briefs by the trial court, and on November 24, 1948 the District Court granted the motion of the defendant to dismiss and denied plaintiff's motion to transfer the cause to Wyoming (R. 31-33).

OPINION OF THE COURT BELOW.

The United States Court of Appeals for the Seventh Circuit, ... F. (2d) ....., affirmed the decision of the trial court. Copy of the opinion, R. 53, *et seq.*

THE QUESTIONS PRESENTED.

The principal questions presented to the Trial Court and to the United States Court of Appeals for the Seventh Circuit were:

1. Whether the Trial Court erred in applying the two year statute of limitations prevailing in the State of Illinois instead of the four year statute of limitations applicable in the State of Wyoming where the injury occurred.

2. Whether the Trial Court erred in refusing under all the facts and circumstances to transfer the cause to the Federal Court in Wyoming.

All of these questions were decided by the United States Court of Appeals for the Seventh Circuit adversely to the petitioner.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The United States Court of Appeals for the Seventh Circuit has erroneously decided federal questions of substance in conflict with the decisions of this Court, to-wit:

A. In applying the two year statute of limitations prevailing in the State of Illinois instead of the four year statute of limitations applicable in the State of Wyoming, contrary to the policy announced by this Court in *Herb* v. *Pitcairn*, 384 Ill. 237, 51 N. E. (2d) 277; 384 Ill. 281, 51 N. E. (2d) 283; 324 U. S. 117, 65 S. Ct. 459; 325 U. S. 77, 65 S. Ct. 954; 392 Ill. 138, 64 N. E. (2d) 519.

B. In refusing to transfer said cause to the Federal Court in Wyoming as required by Section 1406 of the New Judicial Code and contrary to the policy announced by this Court in *Herb* v. *Pitcairn*, 384 Ill. 237, 51 N. E. (2d) 277; 384 Ill. 281, 51 N. E. (2d) 283; 324 U. S. 117, 65 S. Ct. 459; 325 U. S. 77, 65 S. Ct. 954; 392 Ill. 138, 64 N. E. (2d) 519; and followed in *Schoen* v. *Mountain Producers Corp., et al.*, (3 Cir.) 170 F. (2d) 707.

It is essential that a Writ be granted in order to determine an important question relating to the construction and interpretation of the decision of this Court in *Herb* v. *Pitcairn, supra.* It is the contention of the petitioner that the Trial Court and the United States Court of Appeals for the Seventh Circuit have ignored the decision of this Court in *Herb* v. *Pitcairn.*

Prayer.

Wherefore, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court the transcript of record in the case entitled, *"Margaret I. Riley, Plaintiff-Appellant* v. *Union Pacific Railroad Company, Defendant-Appellee,* number 9787", including also the proceedings in said trial court, together with the denial of petitioner's request for reversal by the United States Court of Appeals for the Seventh Circuit, to the end that said cause may be reviewed and determined by this Court and the judgment of the lower courts be reversed.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF CASE.

The facts with reference to the origin and history of the case have been sufficiently covered in the petition, and in the interests of brevity will not be here repeated. The issues and the questions before the Court have been discussed in the preceding petition so that the detailed picture need not be repeated.

Specifications of Errors to be Urged.

The trial court and the United States Court of Appeals for the Seventh Circuit erred:

1. In applying the two year statute of limitations prevailing in the State of Illincis instead of the four year statute of limitations applicable in the State of Wyoming.

2. In refusing to transfer said cause to the Federal Court in Wyoming as required by Section 1406 of the New Judicial Code.

ARGUMENT.

The statute of limitations effective in the State of Wyoming provides that actions for personal injury shall be brought within four years. Because it will be necessary to compare the Wyoming statute with the Illinois statute, we are setting out both statutes in full, for the court's convenience:

Section 15, Chapter 83, Illinois Revised Statutes, 1947, provides:

> "Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty or for abduction, or for seduction, or for criminal conversation, shall be commenced within two years next after the cause of action accrued."

Section 3-506, Wyoming Compiled Statutes, 1945, provides:

> "Within four years, an action for trespass upon real property; an action for the recovery of personal property, or for taking, detaining or injuring the same; * * * ; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; * * *".

Section 3-521, Wyoming Compiled Statutes, 1945, provides:

> "If in an action commenced in due time, a judgment for the plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has at the date of such reversal or failure expired, the plaintiff * * * may commence a new action within one year after such date * * *."

The defendant contended below and the lower court ruled that although the present action was instituted within the time allowed by the Wyoming statute, the proceeding was barred in the lower court because it had not been instituted within the period prescribed by the Illinois statute.

We contend that neither the defendant's argument nor the lower court's ruling was consistent with either good morals or sound law. We are aware of no definitive decision of the United States Supreme Court which decides this question one way or another. We believe the correct rule should require the plaintiff be accorded the same rights, privileges and immunities in the State and Federal Courts of Illinois that would have been her due under the laws of Wyoming, had plaintiff chosen to file her suit such a long distance away from the place of her residence.

With the court now familiar with the factual situation, we think it necessary to analyze briefly the nature of a statute of limitations. A statute of limitations has now acquired a universal concept in all courts both State and Federal. We hardly deem it necessary to remind the court that according to a host of authorities, a statute of limitations operates on the remedy directly and does not extinguish the right.

Everywhere it has been held to be a statute of repose. See *Campbell* v. *Haverhill,* 155 U. S. 610, 15 S. Ct. 217; *Michigan Insurance Bank* v. *Eldred,* 130 U. S. 693, 9 S. Ct. 690; *Campbell* v. *Holt,* 115 U. S. 620; *Smith* v. *Toman, et al.,* 308 Ill. 414, 14 N. E. (2d) 478; *Desiron, et al. v. Peloza, et al.,* 308 Ill. App. 582, 32 N. E. (2d) 316; *Chicago Board of Underwriters* v. *Industrial Commission,* 332 Ill. 611, 164 N. E. 216; *O'Connell* v. *Chicago Park District, et al.,* 376 Ill. 550, 34 N. E. (2d) 836; *Company* v. *Maika,* 16 Wyo. 141, 92 P. 619; *Bonam* v. *Southern Menhaden Corp.,* 284 F. 362; *Lamb* v. *Powder River Livestock Co.,* (8 Cir.) 132 F. 434; *Lightfoot* v. *Davis,* 198 N. Y. 261, 91 N. E. 582;

Wells v. *Enright,* 127 Cal. 669, 60 P. 439; *Mulvey* v. *Boston,* 197 Mass. 178, 83 N. E. 402; *Galliher* v. *State Mutual Ins. Co.,* 150 Ala. 543, 43 So. 833; *Willoughby* v. *Irish,* 35 Minn. 63, 27 N. W. 379; *United Cigarette Mach. Co.* v. *Brown,* 119 Va. 813, 89 S. E. 850; *Brown* v. *Bell,* 46 Colo. 163, 103 P. 380; *In Re: Smith,* 179 Wash. 417, 38 P. (2d) 244; *Stock* v. *Schloman,* 322 Mo. 1209, 18 S. W. (2d) 428; *Parsons* v. *Utica Cement Mfg. Co.,* 82 Conn. 333, 73 Atl. 785; *Dern* v. *Olsen,* 18 Idaho 358, 110 P. 164; *Newhall* v. *Field,* 13 N. M. 82, 79 P. 711; *Kerper* v. *Wood,* 48 Ohio 613, 29 N. E. 501; *Greene* v. *Greene,* 145 Miss. 87, 110 So. 218; *Sally* v. *Bank of Union,* 150 Ga. 281, 103 S. E. 460; *Connecticut Mutual Life Ins. Co.* v. *Dunscomb,* 108 Tenn. 724, 69 S. W. 345; *Lamberton* v. *Grant,* 94 Me. 508, 48 Atl. 127; *Colonial Mortgage Co.* v. *Northwest Thresher Co.,* 14 N. D. 147, 103 N. W. 915.

It goes without saying, therefore, that Mrs. Riley's rights against the defendant have by no means been extinguished. Assuming for the purpose of argument the two year statute in effect in Illinois applies to her case where she files suit in that state, her action would still be good in the State of Wyoming, if the lower court had transferred her case to that state.

As the Illinois Supreme Court pointed out in the case of *O'Connell* v. *Chicago Park District, et al.,* 376 Ill. 550, 34 N. E. (2d) 836, it is nothing new or novel for a plaintiff to have two remedies, one barred and one not barred. Plaintiff, when she awakened to the reality that the defendant did not mean to deal fairly with her contrary to the assurance of defendant's assistant chief claim agent, had little time in which to seek out counsel in the State of Wyoming, who would be interested in handling her case. Plaintiff also, in view of the defendant's promises that they meant to deal fairly with her, had the right to file her suit in the State Courts of Illinois, which was the

place nearest her home and where she was more familiar with counsel.

The defense of the statute of limitations need not have been asserted by the defendant. We do not quarrel with the proposition that the defendant had a legal right to file this plea. However, if the defendant were actuated by a spirit of fairness and good faith it would have advised plaintiff to file her action in the State of Wyoming, although this would be hundreds of miles away from her home and would involve unreasonable burdens and expense to her.

Certainly, the Congress of the United States must have had such a situation in mind when it enacted Section 1406 of the New Federal Judicial Code which provided the lower court with authority to transfer proceedings such as these, so that the ends of justice would be served.

The trial court abused its discretion in dismissing this case without allowing the order for transfer in view of the plain language of this statute which, as held in *Schoen* v. *Mountain Producers Corp., et al.,* (3 Cir.) 170 F. (2d) 707, should receive a liberal and remedial interpretation accorded to the new code. The interpretation of the trial court was neither liberal nor remedial but unnecessarily narrow and restrictive.

Courts have been hesitant in allowing parties to rely upon statutes of limitations to the oppression of another. The courts have again and again called attention to the policy underlying statutes of limitations, to wit: That a defendant should not be harassed with a stale claim presented many years after the facts occurred because of the difficulties of investigation and defense. Many courts have said statutes of limitation are to be used as a shield of defense and not a sword of offense. It is because they are statutes of repose affecting only the remedy that the courts have created many exceptions where the conduct of

the party seeking to enforce the statute should operate to prevent its availability.

It has been held that the effect of a part payment takes the case out of the operation of the statute of limitation. See *Berry* v. *Berry,* 238 Ill. App. 507; *U. S.* v. *Wilder,* 13 U. S. 254, 20 L. Ed. 681. Also a new promise to pay prevents the operation of the statute. *In re Estate of Chapman,* 248 Ill. App. 12; *Bank* v. *Conklin,* 293 Ill. App. 53, 10 N. E. (2d) 864.

Further, it is firmly established that such defense may be waived or lost by estoppel. *Allen* v. *Smith,* 129 U. S. 465, 9 S. Ct. 338. It has been established by an overwhelming weight of authority that the equitable doctrine of estoppel *in pais* is applicable to prevent a fraudulent or inequitable resort to the statute of limitations. See *Schroder* v. *Young,* 161 U. S. 334, 16 S. Ct. 512. The rule that the doctrine of estoppel applies is true without any distinction between actions at law and actions in equity. See Annotation 130 A. L. R. 9.

On the question as to whether or not the lower court abused its discretion in refusing to transfer this cause to the Federal District Court in Wyoming, even though the lower court clearly had been given such authority by Section 1406 of the New Judicial Code, perhaps the most analogous case, and one which supports our whole contention is that of *Herb* v. *Pitcairn.* This case resulted in five decisions, three by the Supreme Court of the State of Illinois, and two by the Supreme Court of the United States. For the sake of convenience, we are listing below the various citations for this case:

Supreme Court of Illinois, First Appeal, 384 Ill. 237, 51 N. E. (2d) 277.

Supreme Court of Illinois, Second Appeal, 384 Ill. 281, 51 N. E. (2d) 283.

Supreme Court of the United States, First Opinion, 324 U. S. 117, 65 S. Ct. 459.

Supreme Court of the United States, Second Opinion, 325 U. S. 77, 65 S. Ct. 954.

Supreme Court of Illinois, Final Decision 392 Ill. 138, 64 N. E. (2d) 519.

The case of *Herb* v. *Pitcairn, supra,* was thoroughly discussed in the brief submitted to the lower courts, but unfortunately must have been inadvertently overlooked. The factual background of this case is so similar to that presented in *Herb* v. *Pitcairn* and the analogy is so close that we desire to analyze the decision in considerable detail.

A suit was filed against the receiver of the Wabash Railroad in the City Court of Granite City, Illinois, alleging an injury to the plaintiff by reason of an alleged violation of the Federal Employers' Liability Act. While the case was pending, the Supreme Court of Illinois held, in another case, that the City Court had no jurisdiction over the subject matter. It should be noted that in *Herb* v. *Pitcairn* jurisdiction over the subject matter was involved, and the court was not dealing merely with the statute of repose, which if applicable bars only the remedy and not the right, but with a situation which would leave the court utterly divested of any power to proceed and which would render any judgment void to such an extent that the defect could not be cured or even weighed by the parties. In the case at bar it cannot be claimed that this court has no jurisdiction over the subject matter.

However, after the statute of limitations had run, a motion was made in *Herb* v. *Pitcairn* to transfer the case from the City Court of Granite City, Illinois, to the Circuit Court of Madison County. This motion was made pursuant to the venue statute of Illinois (Illinois Revised Statutes, 1943, Chapter 146, paragraph 36) which author-

ized a change of venue of a cause commenced in the wrong court or county to the proper court or county. The material part of this Illinois statute is as follows:

> "That whenever any suit or proceeding shall hereafter be commenced, in any court of record in this state, and it shall appear to the court where the same is pending, that the same has been commenced in the wrong court or county, then upon motion of either or any of the parties to such suit or proceeding, the court shall change the venue of such suit or proceeding to the proper court or county * * *."

The similarity between this statutory provision and the phraseology of Section 1406 of the New Judicial Code is striking. The latter provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought."

It is elementary that under the removal statute the integrity of all previous proceedings in the state court should be maintained and this result is also required by the Federal Rules of Civil Procedure, which specifically provide for a liberal interpretation and application of their provisions.

In the case of *Herb* v. *Pitcairn* it was contended that inasmuch as the City Court of Granite City had no jurisdiction over the subject matter, the action could not be regarded as having been commenced in that court or could not have been pending there. Rejecting this contention, the Supreme Court of the United States, reversing the Supreme Court of Illinois, held that the order of removal was improper and that, even though the statute of limitations had expired, the plaintiff was permitted to proceed with his case in all respects as though his case had been originally commenced in the Circuit Court of Madison

County. The Supreme Court of Illinois in a later opinion conformed to the decision of the Supreme Court of the United States, as noted in 392 Ill. 138, 64 N. E. (2d) 519. In this later opinion the Supreme Court of Illinois said:

> "It seems, therefore, the want of jurisdiction in the first instance does not prevent the court from exercising the same function of transferring the cause to another court. It is a special and limited jurisdiction given for this purpose, and must be exercised for that purpose and for no other purpose. We have said it applies to circuit courts and to county courts, and no reason has been pointed out why it does not apply to city courts. It is true that jurisdiction involved in the city court in this case is territorial, but the effect of such want of jurisdiction is the same as the want of jurisdiction of the subject-matter or of the person—that is, the court cannot proceed and render a valid judgment."

The statutes of the United States (Title 28, United States Code, Section 1406) have now empowered the District Courts with the identical authority granted to the courts of Illinois by the venue statute interpreted and applied in *Herb* v. *Pitcairn*. Since we regard this case as directly in point we are not inclined to burden the court with further citations or further discussion. No good reason appears to us why the court should place a narrower or more restricted interpretation upon its powers than was indicated by the Supreme Court with reference to the powers of a state court under the Illinois venue law, the purpose of the two statutes being identical. It will be noted that this was the view taken of Section 1406 by the reviser in his notes. With reference to this section the reviser has attached this heading: "Section 1406—New Section." It will be noted that in practically all other cases he has merely indicated, "Section Revised". Likewise, he states that Subsection (a) provides statutory sanction for transfer instead of dismissal where venue is improperly laid.

Conclusion.

It is the contention of the plaintiff that the Wyoming statute which provides for a four year period of limitation, rather than the Illinois statute should apply to this case, and that in allowing the defendant's motion to dismiss the lower court erred in holding that the Illinois statute applied. Under the peculiar circumstances of this case the defendant should not be allowed to use the statute of limitations oppressively, and is estopped by reason of its conduct from asserting the statute as a special defense.

Assuming for the purpose of argument only the two year and not the four year statute applies, the trial court abused its discretion in refusing to transfer this case to the Federal Court in Wyoming where, concededly, jurisdiction and venue would be proper, and where both parties could have a trial on the merits. It could thus be determined whether plaintiff did or did not have a good, valid and meritorious cause of action against the defendant.

Certainly, the defense here is one of the most technical recognized in law. Doubts should be resolved against it rather than in its favor.

On January 25, 1949 an action on the same cause of action and between the same parties was commenced in Federal Court in Wyoming. Before this present appeal could be completed, the defendant made a motion to dismiss in the Wyoming action and is there relying on a similar hypertechnical defense contending that the saving clause in the Wyoming statute of limitations does not apply to the instant situation.

In view of this complicated picture we again repeat our statement to the trial court that the sound and sensible solution to the problem, and the only way to save these parties from years of litigation over jurisdictional prob-

lems would be to transfer the present case to the Federal Court in Wyoming.

We urge once again that it was to cover such a situation as this that the Congress enacted Section 1406 in the New Federal Judicial Code. It goes without saying that if the lower court had transferred the action to the Federal Court in Wyoming as requested by the plaintiff's motion, both plaintiff and defendant would have an opportunity to have their rights determined on the merits. If the defendant was responsible for this accident, then the defendant will have its day in court and certainly the defendant should not complain about giving plaintiff, a paying passenger, a redress for her wrongs.

We state once again that the United States Supreme Court in the case of *Herb* v. *Pitcairn,* wholeheartedly approved of allowing the transfer of an action if a failure to do so would prevent an adequate and fair hearing on the merits.

Respectfully submitted,

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